# No. 13,727

# United States Court of Appeals
## For the Ninth Circuit

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CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
*Petitioner,*

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
*Respondents.*

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## PETITIONER'S REPLY BRIEF.

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## PETITIONER'S REPLY BRIEF.

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### PRELIMINARY STATEMENT.

In the interest of clarity in sustaining its position on the instant petition for review, petitioner feels it incumbent to set forth herein that it is not in agreement with the respondent Board in its "counter statement of the case".

First, Bay Area was never organized "on behalf of the consignees of the members" but rather, as stated by witness Alexander (R. 127) his firm and about 25 other growers and shippers in the San Francisco area signed the original papers organizing the association to effect economies for themselves in the

cost of transportation and to better coordinate their shipments.

It is clear that Bay Area was organized by the original nineteen subscribers to the Articles of Association, Incorporation and By-Laws, all of whom were growers-shippers in this area. (Exhibits EA 386, 766 and BA 10.)

Second, Bay Area, as a nonprofit cooperative association, has declined to apply for a letter of registration as a common carrier air freight forwarder for the simple reason that to do so would require it to makes its services available to any and all shippers of flowers (whether producers or not) indiscriminately, and to whomever may wish to use its facilities and services. This it has no desire to do and is prohibited from doing under its Articles and By-Laws, which restricts its membership to producers of horticultural and floricultural products.

Third, the respondent Board ignores the original purpose of the Order of Investigation herein to determine whether or not Bay Area "has engaged or is *(now) engaging* indirectly in air transportation * * *" (R. 5.) The respondent Board recites considerable history *prior to the incorporation of Bay Area* under the general corporation code and prior to October 17, 1952, when it was reincorporated under the Nonprofit Cooperative Association Act as contained in the Agricultural Code of the State of California.

For these reasons we take exception to the emphasis laid by the Board upon the trucker-agent status of one Reynolds, who, long since, is no longer associated with Bay Area; or the operating practices referred to in the Board's counter statement of the case of the remittances by the direct air carriers of funds to the trucker-agent. This ignores the establishment of procedures following conferences with the office of enforcement. (R. 272-274) by which all advance charges due Bay Area were remitted to and deposited in Bay Area's account and from which all operating expenses, including pick-up, trucking and terminal services are paid.

Fourth, petitioner has never contended that common carrier status, if in fact established, can be avoided by any disclaimer of carrier responsibility. There are no agreements in this record between petitioner or its members, attempting to set forth any agreement disclaiming carrier responsibility. However, it is contended by petitioner that the relationship of principal and agent implicit in the cooperative association, eliminates the question of carrier responsibility on the theory of agency, as referred in the *Pacific Coast Wholesalers* case cited in our brief. 338 U.S. 689.

Fifth, in its counter statement, the respondent Board seems to imply that there was a hearing on the merits in the matter of the exemption application (R. 390-394) whereas the fact is that the respondent Board denied any hearing on said application for

exemption and, although it considered the record in the enforcement proceedings in making its findings in the order dismissing the application, (R. 392) it denied petitioner's request for consolidation of its application for exemption, Docket No. 5037, with said Docket No. 4902. (R. 394.) We emphasize this apparent inconsistency in the position of the Board since it is acknowledged (R. 392) that the application for exemption "raised questions of such a complex and controversial nature that they should be *thoroughly* explored in a public hearing," and then concludes to deny the application "without prejudice to the renewal thereof in the formal investigation contemplated" in Docket No. 5947, now in hearing.

In short, we find no justice in the Board's position that to permit petitioner to operate outside the regulatory frame work of the act would be contrary to the public interest in that similar treatment would be required for other such organizations, with possible disastrous consequences to the existing regulated freight forwarder industry. On the same day, February 5th, 1953, it ordered an investigation into the whole question of the indirect carriage of property, naming nine (9) additional shippers' associations of various commodities, in addition to petitioner herein, as respondent without any indication of an intent to issue a cease and desist order against the other nine (9) respondent shipping associations. It is submitted that if the Board is finally concluded on the soundness of its position in issuing an immediate

cease and desist order against petitioner herein, without hearing on its application for exemption, there was little need for petitioner to be joined as a respondent in further proceedings in Docket No. 5947. (R. 406-410.)

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## ARGUMENT.

### I. THE BOARD INCORRECTLY AND ERRONEOUSLY DETERMINED PETITIONER'S STATUS TO BE THAT OF AN INDIRECT AIR COMMON CARRIER.

It is believed that a true definition of the Board's policy on this question is seen in the statement on page 12 of its brief under this point. That is, the Board determined petitioner to be a common carrier primarily on the ground that petitioner's transportation *services are held out and available "through membership" to all growers and shippers* of flowers in the San Francisco area, and on the secondary ground, that its services are held out and available *to all persons who purchase flowers from petitioner's membership.* (Emphasis added.)

It is seen that the emphasis here is on *membership* rather than the operations of petitioner as a bona fide nonprofit cooperative association. This is erroneous and ignores the record.

In the first place, membership is limited to growers as opposed to wholesale shippers of flowers in the San Francisco area, the essential requirement being valid membership in good standing. This was clearly

indicated by the testimony of witness Decia of California Floral Company, which was refused service by Bay Area, having forfeited its membership for nonpayment of dues. (R. 243-244.)

As to the secondary ground, the Board's position again lays emphasis on the relationship between the consignor-seller and consignee-buyer and completely ignores the agency relationship between the member and Bay Area which was deemed, by the Supreme Court of the United States, as the controlling determination against common carrier status as negativing "a holding out indiscriminately to the general public for compensation or hire." *Pacific Coast Wholesalers* case, supra.

In the language of the Court in that case, cited on page 19 of our brief:

> "It is equally clear that the association, as agent for the members, does not 'hold itself out to the general public * * * or provide transportation of property for compensation.' "

It is this agency between the members and the association, rather than the relationship between buyer and seller, on which the Supreme Court relied in ruling that there was no reasonable ground to hold that "it (the association) was holding its services out to the general public".

Under this heading, the respondent Board lays emphasis again on the status of the trucker-agent. As we view this phase of the operation, there are only two methods by which flowers in boxes can be received

by the direct air carrier,—that is for the shipper to deliver them himself or to arrange for a contract drayman to do so. Whether he does it himself or through a contract drayman is of little significance here since the Board's jurisdiction does not extend to highway truck carrier operations, particularly those of a pick-up, delivery and contract drayman. With this the Board will agree.

The respondent Board has cited no authority for the proposition that a shipper or group or association of shippers, lawfully organized on a nonprofit cooperative basis, cannot contract, through their own association for the performance of such pick-up, delivery and terminal services as are necessary in bringing their shipments to the airport. We believe it will be conceded by the Board that it has no jurisdiction to control the arrangements between shippers or association of shippers and their contract draymen for such services.

In this connection, it should be noted tht the operations and practices prevailing at the time of Reynolds as trucker, have long since been discontinued and do not constitute the Bay Area's operation at the present time nor at the time of the conclusion of the hearing in this proceeding.

In any event, as to alleged solicitation, a close review of the direct and cross-examination of each of the witnesses called by the enforcement attorney, in seeking to establish "solicitation of members" was completely discounted. See, for example, witness

Nuckton (R. 495), witness Tal Lloyd (R. 269). (Note: Witness Zappettini at R. 504, apparently confused the status of membership with that of traffic or solicitation of business, but a reading of his entire line of testimony discounts any evidence of solicitation of traffic or membership by the association as such.)

The respondent Board has made reference to numerous letters written by the individual members to their several customer receivers in destination territory, in which they seek to resolve their transportation problems, particularly on the question as to who is to bear the transportation costs, and the establishment and improvement of local drayage service in destination territory. We submit that this is sound business practice by persons in the floral industry in seeking to secure the prompt, less costly, and more direct transportation and delivery of their products through their own association. This falls far short of an "alleged public carrier soliciting traffic from the general public". Moreover, it again lays emphasis on the dealings between the member and his receiver and ignores the status of principal and agent between the association on the one hand and its several members on the other.

The so-called "publicity campaign" such as identifying labels on boxes, affiliate membership in the Society of American Florists, and the common everyday amenities of business practices, again ignores the fact that in the last analysis no single shipment of flowers in boxes will move in the association's service

except at the behest of the member in meeting his customer demands, no more than such member might do individually on his own account, if more costly!

If the petitioner's penetration of the San Francisco market, as asserted, has been substantial, it is only out of realization by the producer and grower of cut flowers and decorative greens of the benefits that redound to him as a producer in arranging for his shipments on a cooperative basis, as recognized by the Nonprofit Cooperative Association Act of the State of California.

The second point of the respondent Board, that petitioner's activities are those of a "common carrier" again involves some of the considerations hereinabove expressed. Whatever the limitations on petitioner's membership may be under the Agricultural Code, yet, in the view of the Supreme Court, there is not a "holding out of its services to the general public". Again, this argument of the Board emphasizes the degree and ignores the principle involved. On this point, if the Board, in the exercise of a sound discretion, while exercising quasi judicial functions, had granted petitioner's petition for reconsideration, rehearing and reargument, and granted further hearing herein instead of denying further hearing, which denial is herein assigned as error, the question of what it can or cannot do under its corporate charter or its declared purposes, or what it in fact does do, as a nonprofit cooperative association, could have

been fully explored, as is now being fully explored, in the course of the hearing in Docket No. 5947.

We do not believe that the answer can be found in the simple assertion that whether a transportation agency is a common carrier depends not upon its corporate charter or declared purposes, but upon what it does, "without fully exploring, on rehearing for example, what petitioner, as a nonprofit cooperative association does in fact do and for whose account."

In response to this argument, petitioner wishes to point out that the existence or nonexistence of so-called "exemption" provisions, or "exclusion" provisions in the Civil Aeronautics Act, is not controlling. If petitioner can validly be held to be a common carrier in the indirect carriage of property, on the record here presented, the existence or not of such a provision would become pertinent. To look to the nonexistence of such exemption provision as basis for holding of common carrier status is to answer the question before deciding it. If petitioner is not a common carrier, this conclusion alone would afford a complete answer to the Board's order of cease and desist. That, in substance, is the only real question on this petition for review.

We believe we have answered the charge of solicitation both as to membership and "receiver" by an analysis of the testimony of witnesses called by the enforcement attorney on this question.

So far as the Bay Area membership is concerned, there is no provision in the Civil Aeronautics Act that prohibits dealings and negotiations between buyer and seller. The members, in seeking to satisfy their customer demands, arrange to deliver them through the agency of their shipping association, and the goods are shipped by the association as agent for the member. In the mass of documentary evidence received, not one was presented showing a demand for service by the receiver upon the petitioner as shipper. We find no distinction here against the holding that arrangements between the association and its members which makes it possible for the association to pass on savings to them, does not constitute a holding out to the nonmember, i.e. the consignee receiver, the obverse of the situation in *Pacific Coast Wholesalers* case. Naturally, a saving will result to the consignee as well as the consignor-member, if transportation costs are held to a minimum through cooperative shipping; but we fail to see the logic in the contention that such savings realized by consignees constitutes a holding out of service to them in the light of the Supreme Court's decision in the *Pacific Coast Wholesalers* case, supra.

In conclusion on this phase of the respondent's argument, we would like to propound this question: Is it an insurmountable or impossible barrier for the Board to have specified in its order that:

1. Petitioner cease any and all correspondence in behalf of its members? or,

2. That petitioner limit its membership to any given number? or,

3. That petitioner eliminate the so-called "publicity campaign" outlined on page 16 of respondent's brief? or,

4. That petitioner discontinue the extension of the "advance charge" for either (a) consolidation services, or (b) pick-up, trucking and terminal services, or both?

If this cannot or will not be done, is not the legal effect of the cease and desist order in this case an attempt to syphon off the savings and economies realized by the industry and labor of flower growers and producers and, in the words of one eminent jurist, "pass them into the pockets of an air freight forwarder", enjoying common carrier status, serving the public indiscriminately for compensation or hire, as well as for profit?

We respectfully submit that a reasonable answer to these questions conclusively establishes petitioner's status as a bona fide non-profit cooperative association of producers and shippers of flowers handling freight for themselves and none other, and that under the authorities cited, petitioner is not a common carrier in the indirect carriage of property, subject to the jurisdiction of the Board.

## II. THE BOARD'S CEASE AND DESIST ORDER IS VOID FOR UNCERTAINTY.

On this point petitioner is not seeking from the Board any definition of common carrier status. What it desires to have is some notice in its order as to the specific acts which it would have petitioner cease from doing as in violation of §401a of the Act.

If it is not any one of the items mentioned above or in our brief, then to what portion of its opinion and decision must the petitioner look to determine any unlawful act on its part?

To state it differently, if it is all of such practices, then they should be specifically set out in the order. Reason and logic should not require petitioner in a bona fide attempt through its members to avail themselves of the benefit of volume rates to be subjected to the "sword of Damocles", so to speak, of such an uncertain order.

The Board has cited no authority contrary to the ruling in *Illinois etc. Co. v. State Public Utilities Commission,* 245 U.S. 493.

Moreover, *Brady Transfer and Storage Co. v. United States,* 80 F. Supp. 110 (35 U.S. 865) is not in point for the simple reason that the carrier there involved was concededly subject to the Commission's jurisdiction holding an irregular route certificate. In such case, it is a simple matter by definition to refer to the irregular route certificate to determine the exact limit and extent of the carrier's authority, be-

yond which a simple direction or cease and desist would be sufficient.

We are not on this question concerned with the *report* or the *opinion* of the Board; rather, petitioner should be informed of the terms and conditions for any violations of which a penalty or injunction could be invoked, if a violation thereof in fact occurred.

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### III. REFUSAL OF THE BOARD TO STAY THE EFFECTIVENESS OF THE CEASE AND DESIST ORDER UNTIL COMPLETION OF THE AIR FREIGHT FORWARDER INVESTIGATION CASE, CONSTITUTED AN ABUSE OF DISCRETION.

We believe that the petitioner's argument on this point is fully covered in its opening brief herein. We merely wish to emphasize here that the Board in this proceeding has exercised quasi judicial functions and as such, any final order is reviewable on the authorities cited.

This petition for review must determine if a bona fide effort on the part of flower growers, producers and shippers to band together for the valid purpose of effecting economies in the distribution and shipping of their products must be eliminated simply because of the fear of the Board that other similar organizations, with like lawful purposes, may be formed.

It is difficult to appreciate how the members of Bay Area have any lack of confidence in their ability to ship cooperatively. There is no appropriation of a substantial part of the Air Freight Forwarding busi-

ness in such case. Further, we believe we have established that every reason and justice in the case requires a suspension of any definitive order until the conclusion of the *Air Freight Forwarder Investigation* case in Docket No. 5947.

It is appropriate to ask at this point, which of the public interests requires the exercise of a sound discretion, avoiding the chaos and irreparable damage that would be suffered by the flower producers and shippers which comprise the Bay Area membership, whose deprivation of cooperative action undertaken pursuant to the authority of Agricultural Code, may seriously prejudice the economy and well being of their industry, or enhancing diminishing revenues and profits of a common carrier, air freight forwarder?

Petitioner is participating in the preparation of a full and complete record in Docket No. 5947 from which it is hoped a reasonable and equitable solution will result. It does not appear to us to be equality of treatment to single out petitioner in an enforcement proceeding and permit nine (9) other shipping associations to continue service to *their* members, while future policy is being determined in Docket No. 5947 before the Board.

We submit that on all of the facts and the evidence in this record, the Board's refusal to suspend the cease and desist order, pending the conclusion of the Air Freight Forwarder Investigation, will result in

prejudice to the flower industry represented by the Bay Area membership and thus constitutes an abuse of a sound discretion and authority invested in the Board by §1005(d) of the Act.

Dated, South San Francisco, California,
March 30, 1954.

Respectfully submitted,
ANTONIO J. GAUDIO,
*Attorney for Petitioner.*